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No. 09-1028

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT A. CLIFFORD,

Petitioner,

v.

DAVID N. MISSNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

REPLY BRIEF

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REPLY BRIEF

Rather than refute Clifford's arguments, Missner reinvents them. Clifford does not, as Missner's Brief in Opposition miscasts the argument, seek an unfettered right for attorneys to speak to the media. Instead, Clifford asserts that where a law firm files a client's complaint in good faith—which is an adjudicated fact here—the First Amendment protects the lawyer for public statements about the allegations. It is Missner who, under the strictures of the Constitution, lacks the unfettered right to chill his opposing counsel's advocacy by threatening to drag him before a defamation jury.

The decisions of this Court make clear that attorney speech carries with it significant First Amendment protections. Contrary to Missner's suggestion, these protections apply in both civil and criminal litigation. As with any constitutionally protected activity, these protections will only give way in the face of sufficiently vaunted countervailing interests. With no sufficient interest, the Court is left with nothing to weigh in the balance.

The Opposition here entirely disregards the significant fact that the Illinois Appellate Court found the lawsuit against Missner was filed in good faith. The finding of good faith precludes Missner from credibly asserting any sufficient interest to overcome Clifford's and the Clifford Law Firm's constitutional rights to repeat the allegations of a client's complaint outside of the courtroom. The Illinois Appellate Court's interpretation of the "self-conferral" exception to the fair report privilege, under the narrow facts of this case, creates an impermissible chill on the First Amendment rights of Clifford and all Illinois counsel.

A. The First Amendment Precludes Application of the Fair Report Privilege "Self-Conferral" Exception to an Attorney's Good Faith, Extrajudicial Speech About a Pending Case.

Ignoring both the relevant case law and the substance of the Petition's central basis, Missner instead recasts Clifford's position as arguing for an absolute privilege, akin to the privilege for lawyer speech inside the courtroom. [Opp. at 14, 15, 16.] Nothing could be further from the plain language of the Petition. Rather, Clifford has demonstrated that this Court has applied the First Amendment to every other context of attorney speech that has come before it, whether involving the solicitation of clients, *Florida Bar v. Went for It*, Inc., 515 U.S. 618 (1995); 501 U.S. 1030 (1991); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); *Bates v. State Bar of Arizona*, 433 U.S. 350; the conduct of the courtroom in trial, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); or direct communication with the press, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In each of these cases, this Court has weighed the countervailing interests under heightened scrutiny, and determined the First Amendment parameters of statutory or judicial restrictions on speech.

Clifford asks the Court to conduct the same weighing of interests here. The First Amendment right of a lawyer to speak outside of the courtroom for a client cannot seriously be questioned. The only issue here is under what conditions a litigant may ask the court system to constrain that speech through the threat of punishment by a jury. Where an appellate court has found speech attributed to the lawyer was based on the good faith allegations of his client, a tort plaintiff does not present a sufficient countervailing interest. This is not the result of "absolute"

privilege. Here, Clifford's First Amendment right should prevail as Missner presents no countervailing interest that would suffice under heightened scrutiny.

B. The First Amendment Protects Noteworthy Lawyers in Personal Injury Cases Just as it Protects Lawyers in Criminal or Civil Rights Cases.

Missner also suggests that an attorney whose practice includes personal injury cases is not entitled to the same First Amendment protection as an attorney handling civil rights claims. He distinguishes the First Amendment protections afforded to Dominic Gentile's speech in a "governmental misconduct" case from this matter, which he minimizes as arising out of a "civil case between lawyers." [Opp. at 15, citing *Gentile*.] In no other context—lawyer advertising, lawyer discipline, or even lawyer speech to the press—has this Court ever held that the court system may constrain First Amendment freedoms in the context of civil cases to a greater extent that in criminal cases.[1] Indeed, in *Gentile*, this Court stressed, without limiting its holding to the criminal context, that the judicial system plays "a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nevada*, 501 U.S. 1034, 1035 (1991). *Gentile* instructs that attorney speech provides a valuable resource to the public, and that publicity can be an effective part of an attorney's representation of his client. *Id.* at 1043, 1056.

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1. Moreover, in this matter, the underlying case is not a garden-variety civil matter; the operation of the judicial system was at the heart of the allegations. As an Illinois appellate court found, there was credible evidence to believe that the affidavit of a former FBI investigator was forged in order to coerce Clifford's client, an attorney, into settling a case. App. 61a, 73a. Although the forgery claim was abandoned, no judicial determination was ever made as to its merits. App. at 73a.

Further, without citation to a particular page or passage, Missner also suggests that *In re Primus*, 436 U.S. 412 (1978) provides a litmus test—that to be protected, the lawyer speech must concern vindication of a client's civil liberties—and that Clifford fails that test. [Opp. at 15.] *In re Primus* addressed a very different question than the one before the Court here, and the distinction the Court has drawn in solicitation cases has centered on the manner of the communication. In *In re Primus*, the Court held that a letter to a potential client did not present the harm, and therefore deserved greater constitutional protection, than the in-person solicitation at issue in a case decided the same day, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 457 (1978). Contrary to Missner's suggestion, the First Amendment recognizes no hierarchy among lawyers in protecting their speech.

Finally, Missner damns Clifford with considerable praise in a further effort to strip him of any rights to free speech. Missner implies that because the Press Statement was issued in Clifford's name, the public would be more apt to credit it as statement of fact. [Opp. at 19]. Missner thus argues that Clifford's prominence in the Bar and success as a trial lawyer makes his speech less worthy of this Court's protection than lesser-known lawyers. [Opp. at 19]. Missner denigrates the public's sophisticated understanding of the judicial system, which the case law recognizes in this context. *See Owen v. Carr*, 113 Ill. 2d 273, 280 (1986); *Solaia Tech. v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 589 (2006). Moreover, the fact that a reasonable reader might know who Clifford is should not deprive the Clifford Law Firm of its ability to issue statements attributing opinions to him that favor his client. Again, this Court has never recognized the hierarchy Missner urges in protecting the First Amendment rights of speakers.

C. The First Amendment Issues Were Preserved Below.

Missner's final misstatement is his suggestion that First Amendment issues were not addressed in the Illinois Appellate Court decision Clifford now seeks to overturn. The opinion itself reveals that this is not true. The Appellate Court stated, "Clifford also argued that the press statement expressed constitutionally-protected opinions, not facts, because 'it presents a trial lawyer's litigation position—or opinion—as to his client's claim.'" App. at 31a. That court ultimately passed on the issue but nevertheless performed a First Amendment analysis, finding that the Press Statement was not entitled to protection. App. at 32a. The case relied upon by Missner affirms that this is sufficient to preserve the issue for review by this Court. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. ___ (Jan. 21, 2010) ("Our practice permits review of an issue not pressed below so long as it has been passed upon.") (internal citations and quotations omitted).

CONCLUSION

This case presents the Court with an excellent opportunity to further define the contours of an attorney's right to speak to the media in connection with a pending case and to prevent Illinois from becoming the only state to misapply defamation law in contravention of the First Amendment. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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